

1 THE HONORABLE JOHN C. COUGHENOUR
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 FREDERICK J. FISCHER, III,

Case No. C10-1088-JCC

11 Petitioner,

ORDER

12 v.

13 DAVID KENNEY,

14 Respondent.

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16 The Court, having reviewed Petitioner's complaint (Dkt. No. 1), Respondent's motion
17 for summary judgment (Dkt. No. 13), the report and recommendation of U.S. Magistrate Judge
18 James P. Donohue (Dkt. No. 24), Petitioner's objections thereto (Dkt. No. 32), and the
19 remaining record, adopts the report and recommendation. The Court grants Respondent's
20 motion for summary judgment on the grounds of qualified immunity and alternatively on the
21 merits and dismisses Petitioner's action with prejudice.

22 The Court must make a de novo determination of those portions of a magistrate judge's
23 report or proposed findings or recommendations to which a party objects. 28 U.S.C.
24 § 636(b)(1).

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1 I. PETITIONER'S OBJECTIONS

2 Petitioner objects that an issue of material fact exists regarding whether he suffers from
3 narcolepsy. Petitioner has put forth no evidence to validate his claim that he was diagnosed in
4 1965, and Respondent, after investigation, was unable to locate any records of the alleged sleep
5 study. (Dkt. No. 14 at 5.) Petitioner's bare assertion is insufficient to create more than a
6 "metaphysical doubt" regarding a material fact. *See Matsushita Elec. Indus. Co. v. Zenith*
7 *Radio Corp.*, 475 U.S. 574, 586 (1986) (holding that the nonmovant must do more than simply
8 raise metaphysical doubt about the material facts).

9 Likewise, Dr. Hammond's statement that narcolepsy must be confirmed by a sleep
10 study fails to create an issue of material fact. The statement only pertained to *confirming* a
11 diagnosis of suspected narcolepsy. (*Id.* at 3.) Petitioner has shown no symptoms of narcolepsy
12 and therefore does not need a confirming diagnosis. (*Id.* at 4, 5.) Additionally, the fact that two
13 primary-care providers referred the sleep study to the review board does not create an issue of
14 material fact. *See Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989) (holding that one doctor's
15 recommendation of surgery was merely a differing opinion on treatment and did not require
16 adherence).

17 Second, Petitioner objects to the Report's finding that Respondent was not deliberately
18 indifferent to his condition. Prisoners are afforded all healthcare that is medically necessary.
19 Wash. Admin. Code § 137-91-010. Contrary to Petitioner's assertion, sleep disorders are
20 covered by the Department of Corrections. They are Level 2 care, which are examined on a
21 case-by-case basis and are covered in some circumstances. (Dkt. No. 14 at 3; Dkt. No. 14-1 at
22 30.) In the absence of any documented symptoms, denial of further testing and medication is
23 not indifferent. Respondent's denial of medication is merely a difference in treatment and, as
24 such, does not rise to the level of deliberate indifference. *See Sanchez*, 891 F.2d 242 (holding
25 that a difference in opinion regarding treatment does not amount to deliberate indifference to
26 serious medical needs).

1 Third, Petitioner objects to the Report’s conclusion regarding Respondent’s qualified
2 immunity. The qualified immunity inquiry has two elements: whether there was a clear
3 violation of Petitioner’s Eighth Amendment rights and whether those rights were clearly
4 established. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). As to the first inquiry, Respondent was
5 not deliberately indifferent to Petitioner’s alleged condition; instead, Petitioner continued to be
6 seen for narcolepsy despite a mounting lack of symptoms. (Dkt. No 14 at 4, 5.) Petitioner’s
7 allegations were also not “sufficiently serious” because narcolepsy rarely interferes with daily
8 activities and Petitioner had no documented injuries. *See Farmer v. Brennan*, 511 U.S. 825,
9 847 (1994) (holding that the depravation must be objectively “sufficiently serious” to be a
10 denial of the minimal civilized measure of life’s necessities). Moreover, there is no evidence
11 that Respondent knew of and disregarded a serious risk to Petitioner. On the contrary,
12 Petitioner was seen repeatedly for different ailments. (Dkt. No. 14 at 4-7.)

13 In addition to falling short on the first inquiry, Petitioner’s right to further tests and
14 medication was not clearly established. Respondent reasonably believed that he was acting
15 lawfully when he denied medication on the basis of an apparent lack of symptoms. *See Romero*
16 *v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991) (holding that the officer should prevail if
17 he could have reasonably believed his conduct was lawful). Qualified immunity is granted to
18 all but the plainly incompetent or those who knowingly violate the law; thus, Respondent falls
19 under its shield. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986).

20 **II. CONCLUSION**

21 The Court ADOPTS the report and recommendation (Dkt. No. 24). The Court
22 GRANTS Respondent’s motion for summary judgment (Dkt. No 13) and DISMISSES
23 Petitioner’s action WITH PREJUDICE.

24 The Clerk of Court is directed to send copies of this Order to Petitioner and to
25 Magistrate Judge James P. Donohue.

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1 DATED this 14th day of June 2011.
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6 John C. Coughenour
7 UNITED STATES DISTRICT JUDGE
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